

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **ALFONSO SALAZAR,**

5 *Applicant,*

6 vs.

7 **LEPRINO FOODS, permissibly self-insured,**
8 **administered by MATRIX ABSENCE**
9 **MANAGEMENT, INC.,**

10 *Defendants.*

Case No. **ADJ83 11836**
(Fresno District Office)

**OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION**

11 Defendant Leprino Foods, administered by Matrix Absence Management, Inc. (defendant) seeks
12 reconsideration of the Reissued Order issued on January 28, 2016 by a workers' compensation
13 administrative law judge (WCJ). The WCJ confirmed that pursuant to the Amended Findings of Fact,
14 Award, Order and Opinion on Decision (F&A) issued November 20, 2014 following a trial on the merits
15 of applicant's Labor Code section 132a petition, applicant is entitled to reinstatement of his position as
16 brine floater relief worker between December 6, 2011 and May 24, 2013 and thus, is entitled to a
17 concomitant increase in his pension benefits. The WCJ ordered that defendant make payment of the
18 increased pension benefits directly to applicant because of the Teamsters Pension Trust's refusal to
19 administer the increase, the amount to be adjusted between the parties.

20 Defendant takes no issue with the WCJ's authority pursuant to Labor Code section 132a to order
21 the increase of pension benefits based on applicant's reinstatement period; however, defendant contends
22 that the WCJ has no authority to order the Western Conference of Teamsters Pension Plan (WCTPP) to
23 issue and/or accept payment of the increased pension amount, and that to pay the increased pension
24 directly to applicant would be a violation of the collective bargaining agreement which requires that
25 defendant only pay pension contributions directly to the WCTPP. Defendant insists it has done
26 everything it can do legally to comply with the Reissued Order.

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1 Applicant did not file an answer to the Petition for Reconsideration. The WCJ filed a Report and
2 Recommendation on Petition for Reconsideration (Report) wherein he recommends that the Petition for
3 Reconsideration be denied because the WCAB has the authority to enforce, "... against the employer or
4 an insurer of any liability for compensation imposed upon the employer by this division in favor of the
5 injured employee ..." (Lab. Code, § 5300 et seq.)

6 Based on our review of the record, the Petition and the Report, which we adopt and incorporate
7 herein, and for the reasons stated below, we deny defendant's Petition For Reconsideration.

8 Generally, workers' compensation is not a "make-whole remedy" and requires the employee "...
9 to shoulder some of the disadvantages of his industrial injury." (*Department of Rehabilitation v.*
10 *Workers' Comp. Appeals Bd. (Lauher)* 30 Cal.4th 1281, 1300 [68 Cal. Comp.Cases 831].) For instance,
11 an injured employee receives only two-thirds of his or her average weekly earnings during the period of
12 temporary total disability. (*Id.* citing Lab. Code, § 4653.) This was part of the bargain struck when
13 industrial injury cases were separated from other civil tort claims in order to "... accomplish substantial
14 justice in all cases expeditiously, inexpensively, and without incumbrance of any character ..." (Cal.
15 Constitution, Article 14, § 4.)

16 However, an employee who suffers retaliation or discrimination in violation of section 132a is not
17 only entitled to an increase in workers' compensation benefits, but is also "... entitled to *reinstatement*
18 *and reimbursement for lost wages and work benefits* caused by the acts of the employer." (Lab. Code,
19 § 132a(1), (3), emphasis added.) In other words, when an employer violates section 132a, the employee
20 is entitled to be "made whole" for whatever loss in wages and benefits were sustained as a result of the
21 employer's retaliation or discrimination. "The appeals board is vested with full power, authority, and
22 jurisdiction to try and determine finally all matters specified in this section subject only to judicial
23 review ..." (Lab. Code, § 132a.) The WCAB has the authority to enforce any award of damages issued
24 pursuant to section 132a. (Lab. Code, § 5300(b).)

25 Here, defendant does not dispute that applicant's termination was a violation of Labor Code
26 section 132a, nor that the WCAB has the authority to issue both penalties and lost work benefits in the
27 form of an increased pension benefit for the time applicant lost between his wrongful termination and his

1 permanent and stationary date. Instead, defendant contends that to comply with the WCJ's Reissued
2 Order to issue the increased pension benefit directly to applicant would necessarily mean violating its
3 collective bargaining agreement with the WCTPP. However, the WCJ has not ordered defendant to pay
4 increased pension benefits to applicant; defendant is ordered to pay applicant *damages* to be
5 calculated/adjusted by reference to his lost pension benefit.

6 Accordingly, the WCJ had proper authority to order defendant to pay applicant damages in the
7 form of lost work benefits to be calculated/adjusted by the parties for the time applicant lost between his
8 wrongful termination of December 6, 2011 and his permanent and stationary date of May 24, 2013¹. The
9 parties have been ordered to calculate/adjust the amount, and defendant has been ordered to pay to
10 applicant that calculated/adjusted amount.

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25 ¹ The only issue raised by defendant in its Petition for Reconsideration is its alleged inability to pay directly to applicant an
26 increased pension benefit without violating its collective bargaining agreement with the WCTPP. (See Letter to Judge Sims,
27 April 1, 2016.) The WCJ's award of a one-half increase in applicant's compensation in the amount of \$10,000.00 is not at
issue; defendant alleges that it paid the \$10,000.00 (\$8,500.00 to applicant; \$1,500.00 to applicant's attorney) on
December 11, 2014. (*Id.*)

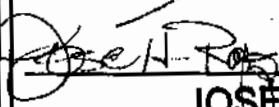
1 For the foregoing reasons,

2 **IT IS ORDERED** that defendant's Petition for Reconsideration of the Reissued Order issued on
3 January 28, 2016 by a workers' compensation administrative law judge is **DENIED**.

4 **WORKERS' COMPENSATION APPEALS BOARD**

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6 
7 **MARGUERITE SWEENEY**

8 **I CONCUR,**

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10 
11 **JOSE H. RAZO**

12 
13 **KATHERINE ZALEWSKI**



14 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

15 **APR 15 2016**

16 **SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR**
17 **ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.**

18 **ALFONSO SALAZAR**
19 **GRANCELL, STANDER, REUBENS, THOMAS AND KINSEY**
20 **KEELING LAW OFFICES**

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27 **AJF:mm**

STATE OF CALIFORNIA
Division of Workers' Compensation
Workers' Compensation Appeals Board

CASE NUMBER: ADJ8311836

ALFONSO SALAZAR

-vs.-

LEPRINO FOODS, LEPRINO
FOODS;
MATRIX SAN JOSE;

WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE: Geoffrey H. Sims

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Defendants, Leprino Foods and Matrix Absence Management Inc. (Petitioners), through counsel, filed a verified Petition for Reconsideration of an order requiring payment of the Labor Code § 132(a) Award directly to Applicant. This was the second such order issued; the first, issued October 14, 2015, was rescinded on November 2, 2015, to allow the parties to argue the matter. At the January 28, 2016 hearing, the undersigned issued a second order, from which this Petition for Reconsideration followed.

II

PROCEDURAL CAVEAT

There is a question as to whether filing this as a Petition for Reconsideration or Petition for Removal is appropriate. Based on a reading that the undersigned's Order of January 28, 2016

constituted a “final” order to pay the Labor Code § 132(a) benefit, it appears appropriate to consider this as a Petition for Reconsideration.

BACKGROUND

Briefly, Applicant worked as a floater relief worker, when, on November 18, 2011, he sustained serious injury to his right hand and arm. The claim was accepted and medical treatment and benefits were provided. However, on December 6, 2011, Applicant was given an “Employer Warning Record” advising that he had failed to “tag out-lock out” the machine on which he was injured. As such, Applicant was terminated. A Petition for Increased Benefits (pursuant to Labor Code § 132(a) was filed. Meanwhile, the underlying matter settled by way of Stipulations With Request for Award, approved February 11, 2014.

The Labor Code § 132(a) discrimination case proceeded to Trial on July 30, 2014 before the undersigned. The Findings of Fact, Award, Order, and Opinion on Decision (FOFA) issued on October 10, 2014, finding that Applicant’s termination was not based on a “good faith” personnel action.

An Amended Findings of Fact, Award, Order, and Opinion on Decision (Amended FOFA), issued November 20, 2014, ordering that Applicant receive the supplemental benefit and be reinstated to his prior position. The Court was advised by letter from Applicant’s counsel, that Petitioners would not be appealing the decision.

No Petition for Reconsideration has ever been filed as to the November 20, 2014 Amended Findings of Fact, Award, Order, and Opinion on Decision.

Since then, though, the matter has been on calendar four times on enforcement of the orders of reinstatement and payment of the \$10,000.00 supplemental benefit. At the first hearing, an order issued that Applicant’s lost time would be reinstated and the parties would adjust the benefits.

The matter was heard again on April 23, 2015. The parties advised that the “issue [was] resolved informally” and the matter was ordered off calendar. (Minutes of Hearing, 02/26/2015.)

But Applicant filed another DOR in July, and a hearing was set for September 14, 2015. However, defense counsel was unavailable, and the matter trailed to October 14th. At that time, a hand-written Order was presented jointly by the parties. The Order issued, indicating that “applicant is entitled to an increase in his petition” resulting from the time lost after his wrongful termination and that “it is hereby ordered that Leprino Foods make payment of the increase directly to Mr. Salazar.” This Order issued with a 20-day window for filing objections.

Petitioners timely filed an objection. For the first time, Petitioners alleged that the Teamster Pension Trust refused to administer the increase and they believed that it would violate the collective bargaining agreement to pay Applicant directly.

Based on this, the undersigned vacated the October 14, 2015 Order, and set the matter for Status Conference on January 28, 2016. At the January 28th hearing, when the parties advised that they could not reach any type of negotiated resolution, a second order issued, echoing the first.

Petitioners have renewed their contention that requiring the additional pension funds to be paid directly to Applicant would constitute a violation of the Teamster contract. This Petition for Reconsideration followed.

IV

DISCUSSION

The undersigned issued the Amended FOFA on November 20, 2014. At that time, it was ordered that “Applicant be reinstated to his position as a brine float relief worker, from the date of termination to the date he was determined to have reached maximum medical improvement” and that he “receive the supplemental benefit of \$10,000.00 pursuant to Labor Code § 132(a).” (Amended

Findings of Fact, Award, Order, and Opinion on Decision, 11/20/2014, at page 2.)

The orders in the Amended FOFA were quite specific as to how the \$10,000.00 was to be paid. The Order stated: “[I]t is hereby ordered that Leprino Foods make payment of the increase directly to Mr. Salazar, Applicant herein. Amount to be adjusted by the parties.” There was nothing in the undersigned’s Amended FOFA Orders, or in the Orders of October 14, 2015 and January 28, 2016 that the sum of \$10,000.00 be paid to the Teamster Pension Trust. (A search of File/Net failed to locate a copy of the January 28, 2016 Order, however.)

Further, those orders set forth in the November 20, 2014 Amended FOFA were never challenged by the filing of a Petition for Reconsideration. The Amended FOFA was issued, by mail, to all parties – including Petitioners and their counsel – on November 20, 2014. Pursuant to Labor Code § 5903, “[a]t any time within 20 days after the service of any final order, decision, or award made and filed by the appeals board or a workers’ compensation judge granting or denying compensation, or arising out of or incidental thereto, any person aggrieved thereby may petition for reconsideration . . .”

By that reckoning, Petitioners had twenty days (plus an additional five days for mailing) to file a Petition for Reconsideration, alleging that they could not comply with that order, or risk violating the Teamster collective bargaining agreement. **Petitioners did nothing to challenge the November 20, 2014 Amended Findings of Fact, Award, Order, and Opinion on Decision.** Instead, Petitioners have allowed this Award to languish and now, at this late date, contend that the collective bargaining agreement bars payment. That issue should have been raised in 2014.

The WCAB has authority, found in Labor Code § 5300, *et seq.*, to enforce “against the employer or an insurer of any liability for compensation imposed upon the employer by this division in favor of the injured employee . . .”

Therefore, it is the undersigned's recommendation that the Petition for Reconsideration of the January 28, 2016 Order be denied. It is undersigned's further recommendation that the WCAB raise sanctions against Petitioners for bad faith actions or tactics, for their frivolous, meritless and unnecessary delay in complying with the undersigned's Amended Findings of Fact, Award, Order, and Opinion on Decision, pursuant to Labor Code § 5813. Lastly, it is the undersigned's additional recommendation that the WCAB raise sanctions against Petitioner for unreasonable delay for their refusal to pay compensation as ordered in the undersigned's Amended Findings of Fact, Award, Order, and Opinion on Decision, pursuant to Labor Code § 5814.

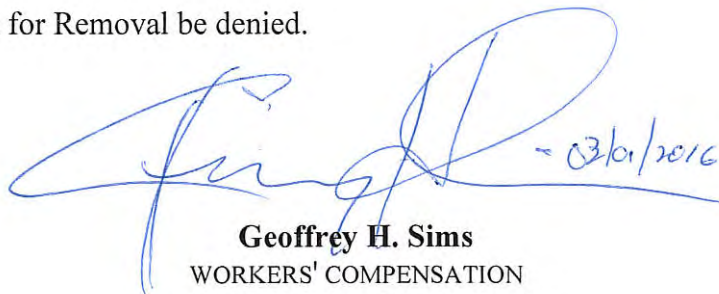
If payment of the \$10,000.00 supplemental benefit places Petitioners into some type of breach of the collective bargaining agreement with the Teamsters, which is not of Applicant's doing. Petitioners triggered the entire chain of events by discharging Applicant from employ without benefit of a "good faith" personnel action. Petitioners had ample time to challenge the November 20, 2014 Amended Findings of Fact, Award, Order, and Opinion on Decision. Petitioners chose not to do so. Petitioners cannot now hide behind a claim of contractual breach with an unrelated third party to avoid a duty they have been court-ordered to comply with for more than one year.

IV

RECOMMENDATION

It is recommended that Petitioner's Petition for Removal be denied.

DATE



Geoffrey H. Sims
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

FILED AND SERVED ON PARTIES LISTED ON
OFFICIAL ADDRESS RECORD (EXCLUDING EMPLOYER).
ON: 3-1-16
BY: MCASTILLO 